



Cowan, D. S. (2016). The judicialisation of homelessness law: A study of Regulation 8(2), Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. *Public Law*, 2016(April), 235-253.

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The judicialisation of homelessness law: A study of Regulation 8(2), Allocation of Housing and Homelessness (Review Procedures) Regulations 1999

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A first theme [of procedural review] is judicialisation and we shall find a general tendency to model the administrative process in the courts' own adjudicative image.¹

Procedural requirements for the decision-making process may be just as important as the substantive law side of that process. But "experience in the salient" (a striking phrase of Sir John MacManners in his memoir Fusilier) is a reminder that regard to how things should be done should not be overdone: ... The world of affairs would fall into unwanted chaos, if a literal approach were taken to every procedure, regardless of context or consequence, and if every irregularity robbed all subsequent acts or decisions of legal effect. In the housing field the consequences of chaos would probably be as detrimental to homeless persons in need of temporary accommodation as to the local housing authority under a duty to provide it.²

Introduction

The twin themes of judicialisation and image-replication are perhaps nowhere more in evidence than in homelessness law. Local housing authorities, which are responsible for the implementation of homelessness law, are caught in an inimical position. Despite the high threshold for a second appeal,³ and only on a point of public law,⁴ together with various words of caution expressed in the highest court,⁵ the textbooks have seemingly endless lists of decided cases.⁶ Despite it being a mere part of one housing Act,⁷ set out over only 43 sections, it is an arena in which the fiercest challenges to local authority decision-making are made by a cadre of legal engineers⁸ who have become more professional and possibly insular as a result. In many cases now, usually lengthy decisions are not

¹ C. Harlow and R. Rawlings, *Law and Administration*, (2009), p. 617

² *Maswaku v Westminster CC* [2012] EWCA Civ 669, [48], Mummery LJ.

³ CPR 52.13, which requires there to be an important point of principle or practice or some other compelling reason why the Court of Appeal should hear it; see also *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60; [2005] 1 WLR 270; cf *Cramp v Hastings BC* [2005] EWCA Civ 1005; [2005] HLR 48, [66].

⁴ S. 204(1), Housing Act 1996; *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] HLR 32, [7], Lord Bingham.

⁵ *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; *Holmes-Moorhouse v Richmond-upon-Thames BC* [2009] 1 WLR 418, [50].

⁶ The most recent edition of A. Arden, E. Orme and T. Vanhegan, *Homelessness and Allocations*, 9th ed. (2012) contains a list of cases that is 34 pages long.

⁷ Housing Act 1996, Part 7.

⁸ I am incorporating all of the actors in this description – from local authority decision-makers through to specialist judges.

written for the applicant, who has sought assistance, but for the primary audience of lawyers and courts.

In this article, I am concerned only with one short regulation, concerned with due process, in a relatively limited set of circumstances, but which has given rise to an inordinate amount of litigation. By Regulation 8(2), Allocation of Housing and Homelessness Regulations,⁹

(2) If the reviewer considers that there is a deficiency or irregularity in the original decision,¹⁰ or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of the applicant on one or more issues, the reviewer shall notify the applicant:

(a) that the reviewer is so minded and the reasons why; and

(b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing.

The reason why this regulation is the focus of this paper is because the jurisprudence which has grown up around it demonstrates this tension between, on the one hand, the tendency to reflect judicial values in administrative decision-making and, on the other hand, the concern about “unwanted chaos” as a result of an overly technical approach. In general, administrative decision-making is treated with considerable deference and this is particularly true of homelessness decision-making in which “nit picking” challenges to decisions are deprecated.¹¹ Homelessness decision-makers are administrators, not lawyers, so that infelicities and some absences of reasoning are judicially overlooked and, even in cases of apparent misdirection, immune to “dissective, semantic arguments”.¹²

In the past 10 years, there have been 13 Court of Appeal decisions in which this Regulation has had to be considered.¹³ Despite this welter of litigation, it cannot be said that the issues have been resolved or are now clear. Indeed, it might be said that tortuous distinctions have been drawn and the regulation (which was never that clear) may have been turned in to something rather different from what was originally intended. It has certainly given rise to an entirely new lexicon for homelessness lawyers, where “minded to” notices and “Reg 8(2) deficiency” have become *de rigueur*. The argument in this article is that judicial contortions around this regulation have created

⁹ SI 1999/71.

¹⁰ The 1999 regulations replaced the Allocation of Housing and Homelessness (Review Procedures) Regulations 1996, SI 1996/3122. The version of Reg 8(2) in those regulations referred only to an “irregularity”. As Carnwath LJ said in *Hall v Wandsworth LBC* [2004] EWCA Civ 1740; [2005] HLR 23, [21]: “There appears to have been no published explanation for the change. We were not referred to any parallel for this formula in other statutes. The most likely inference is that it was intended to reinforce the contrast in the regulation between a defect in the decision itself, and one in ‘the manner in which it was made’; in other words, between the substance of the decision, and the procedure”.

¹¹ *Holmes-Moorhouse v Richmond-upon-Thames BC* [2009] UKHL 7; [2009] 1 WLR 413, at [44]-[52].

¹² *Bellouti v Wandsworth LBC* [2005] EWCA Civ 602, [57].

¹³ *Hall v Wandsworth LBC* [2004] EWCA Civ 1740; [2005] HLR 23; *Gilby v Westminster CC* [2007] EWCA Civ 604; [2008] HLR 7; *Lambeth LBC v Johnston* [2008] EWCA Civ 690; [2009] HLR 10; *Banks v Kingston-upon-Thames LBC* [2008] EWCA Civ 1443; [2009] HLR 29; *Bury MBC v Gibbons* [2010] EWCA Civ 327; [2010] HLR 33; *Makisi v Birmingham CC* [2011] EWCA Civ 355; [2011] HLR 27; *Mitu v Camden LBC* [2011] EWCA Civ 1249; *Nagi v Birmingham CC* [2011] EWCA Civ 355; [2011] HLR 27; [2012] HLR 12; *Maswaku v Westminster CC* [2012] EWCA Civ 669; *Ibrahim v Wandsworth LBC* [2013] EWCA Civ 20; *Obiorah v Lewisham LBC* [2013] EWCA Civ 325; *Mohamoud v Birmingham CC* [2014] EWCA Civ 227; *Temur v Hackney LBC* [2014] EWCA Civ 877; [2014] HLR 39.

an insular jurisprudence which is both contorted and problematic on the terms of the regulation as well as in the contexts of homelessness law itself.

Three significant reasons lie behind the concern at the judicialisation of this aspect of homelessness law. First, the purpose of the review process is for the applicant, unassisted, to request that the local authority reconsider its decision. The process is designed without the need for any formality – a simple “request” triggers the review process. Secondly, we know that the vast majority of homelessness applicants do not challenge negative decisions made by the local authority against their interests.¹⁴ Many do not seek out legal assistance and describe finding such assistance more as luck than judgment.¹⁵ If the review process operates as an informal sift in that sense,¹⁶ we also know that the subsequent court-based challenge to the review decision is one that rarely occurs as well.¹⁷ In short, the review, if it takes place, can make the difference between whether, on the one hand, the local authority comes under housing duties to the applicant or, on the other, decides that they can send them away – the housing need reasons which pushed the applicant to the local authority’s door are then left potentially unresolved. Allied to this point, and of crucial significance, is that points not taken on the review cannot then properly be taken on subsequent appeal unless they were obvious to the reviewer.¹⁸ Thirdly, the Regulation 8(2) procedure¹⁹ is designed to deal with the situation where the initial decision-maker got some aspect of the decision – be it procedural or otherwise – wrong. In this sense, the review process comes to form a proxy for that initial decision, using the correct procedure and adding certain procedural protections. Thus, it forms an adjunct to the “right first time agenda”.²⁰ As we see below, this is an area in which the interpretation of the regulation has been particularly contorted and contested. Whether it adds to good administration is a moot point.

In this article, I first locate the homelessness review process in decision-making. If, as we are told,²¹ procedural protections naturally depend on the type of process engaged, this is a key question. Inevitably, it also involves discussion of the relationship between the common law and the regulation. In the following substantive section, I analyse the jurisprudence and make a number of points as to wrong turnings taken by the courts, demonstrating the jurisprudential contortions. In the final section, I advert to three unanswered questions which are, in one sense, questions of principle: whether the general principle of latitude to local authority decision-making applies here; whether a reviewing officer must highlight the deficiency or irregularity in their decision; and whether the reviewing officer must refer the applicant and their advisor to their right to make oral representations.

¹⁴ D. Cowan and S. Halliday, *The Appeal of Internal Review* (2003); D. Cowan, S. Halliday and C. Hunter, “Adjudicating the implementation of homelessness law: The promise of socio-legal studies” (2006) 21 *Housing Studies* 381.

¹⁵ *Id.*

¹⁶ Those who “lump” the decision, for whatever reason.

¹⁷ M. Sunkin, “What is happening to applications for judicial review?” (1987) 50 M.L.R. 432; papers on file with the author.

¹⁸ *Cramp v Hastings BC, Phillips v Camden LBC* [2005] EWCA Civ 1005; [2005] HLR 48, [14].

¹⁹ Hereafter “the regulation”.

²⁰ R. Thomas, “Administrative justice, better decisions and organisational learning” [2015] P.L. 111.

²¹ See, for example, D. Galligan, *Due Process and Fair Procedures* (1996).

Locating homelessness reviews

This section is divided into three parts. In the first part, I set out the relevant statutory provisions and regulations in outline. In the second part, I ask whether the homelessness internal review process is an administrative or adjudicative process. In the third part, consideration is given to how the regulation fits with the common law.

Homelessness law: Summary

When a person applies for homelessness assistance, the local authority comes under a duty to make inquiries as to whether the person is eligible,²² homeless,²³ in priority need²⁴ and if they are satisfied that the person has become homeless intentionally.²⁵ In the statutory scheme, these are mostly discretionary decisions – so, for example, a person is homeless when they have no accommodation which they can reasonably be expected to continue to occupy; a standard which also incorporates the local authority's "general circumstances prevailing in relation to housing".²⁶ The local authority then can decide²⁷ what duty, if any, is owed to the applicant. If the applicant crosses those obstacles,²⁸ they are entitled to the full housing duty, which involves the provision of accommodation.²⁹ If they do not cross the obstacles for some reason, then the decision is that the applicant is only entitled to more limited duties, such as the provision of advice and assistance or temporary accommodation for a short period. All accommodation provided must be "suitable".³⁰

If the applicant is aggrieved about the decision that has been made, not just of the obstacles but also suitability, then they are entitled to request a review of that decision within 21 days of receipt of the original decision.³¹ The review is to be conducted by someone more senior than the original decision-maker, who was not involved in the original decision.³² The reviewer must consider all the representations made by or on behalf of the applicant.³³ It must be conducted within 56 days of the request being made, unless the applicant agrees to extend the period.³⁴ The applicant must be notified of the procedure to be conducted on review.³⁵ The regulation operates during the review period where the reviewer decides that there is a deficiency or irregularity in the original decision. The reviewer must make their decision based on the facts as at the date of the review decision

²² S. 185.

²³ S. 175.

²⁴ S. 189.

²⁵ S. 191.

²⁶ S. 175(1) and (3); s. 177(2).

²⁷ S. 184.

²⁸ The legislation in its original form was described as an "obstacle race": P. Robson and P. Watchman, "The homeless persons' obstacle race" (1981) 3 *Journal of Social Welfare Law* 65.

²⁹ S. 193.

³⁰ For discussion, see *Nzolameso v Westminster CC* [2015] UKSC 22.

³¹ S. 202; the time limit is subject to residuary discretion to accept a review out of time: s. 202(3); *R(Slaiman) v Richmond upon Thames LBC* [2006] EWCA Civ 312; [2006] HLR 20.

³² Reg. 2, 1999 Regulations.

³³ Reg. 8(1), 1999 Regulations.

³⁴ Reg. 9, 1999 Regulations.

³⁵ Reg. 6, 1999 Regulations.

itself.³⁶ If the reviewer decides to confirm the original decision, then reasons must be given.³⁷ If the applicant is aggrieved with the review decision, then they are entitled to apply to the County Court as of right on a point of law provided that they do so within 21 days of the decision.³⁸

Internal review: Administration or adjudication?

The question of whether an internal review of a homelessness decision is an administrative or adjudicative function has not been answered in the context of the due process requirements of the review. However, it is clearly the case that its location is an essential question underlying the issues raised above about image replication and the degree to which deficiencies might be overlooked. The more adjudicative the process, the more one would expect strict application of the Regulation.

The review process is a “formal” internal review in the sense that it operates as a gateway to, or precondition of, further challenge in the courts.³⁹ Sainsbury argues

Internal reviews can fall into either category [ie administrative or adjudicative] but when they are intended as a means of redress rather than a means of correcting errors or amending benefit awards, they move from the machinery of administration to the machinery of adjudication. There is an argument, therefore, that the standards used to assess their acceptability change accordingly and values such as independence and impartiality become highly salient.⁴⁰

In Galligan’s terms, one might say, then, that the question is significant because it comes down to a question of values. An adjudicative scheme requires full participation by the applicant, whether orally or in writing, and might extend to cross-examination of witnesses over disputed questions of fact. As Sainsbury has put it, an internal review is “characteristically non-participatory”.⁴¹

In *Runa Begum v Tower Hamlets LBC*, the House of Lords considered *en passant* whether the homelessness review process could be contracted out to an organisation beyond the local authority. The discussion hinted at a negative answer on the basis that the review officer was adopting quasi-judicial powers.⁴² It was, then, clear how the House of Lords characterised the review process. That made sense because of the closely prescribed set of procedures to be followed – a significant deviation from which would, it was said, automatically afford a ground of review⁴³ – and because of the significance of the outcome to the interests of the applicant. Indeed, it is the review decision which is subject to public law consideration in the county court as the decision effectively of the first

³⁶ *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57; [2002] HLR 7. This is an instinctively problematic principle because the review decision is not necessarily a “review” of an earlier decision but a fresh decision made on new facts. However, as discussed below, to have decided otherwise would also be problematic – as Jackson LJ said in *Temur v Hackney LBC* [2014] EWCA Civ 877, [35], the opposite would lead to absurd results.

³⁷ It is these review decisions which have become so judicialised – the longest this author has seen is one that was 26 pages long and the subject of a challenge.

³⁸ S. 204, subject to discretion allowing an appeal to be brought out of time on “good reason” grounds: s. 204(2A).

³⁹ M. Harris, “The place of formal and informal review in the administrative justice system”, in M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century* (1999), 44-6.

⁴⁰ R. Sainsbury, “Internal reviews and the weakening of social security claimants’ rights of appeal”, in G. Richardson and H. Genn (eds), *Administrative Law and Government Action* (1994), 297; cf Harris, *op cit*, 43, who argues that “review is a re-appraisal of a primary decision within the administrative area responsible for making that decision. In this sense it is a continuation of the primary administrative decision-making process.”

⁴¹ Sainsbury, *id*: 301

⁴² [2003] 2 AC 430, [97], Lord Millett; also [9]-[10], Lord Bingham.

⁴³ [9], Lord Bingham.

instance tribunal. Further, as Sedley LJ wryly observed subsequently, when the Court of Appeal held that those observations on contracting out were mistaken,

One understands very well why members of the Appellate Committee were dubious, even so, about the contracting out of an adjudicative function as if it were the town hall catering contract. But the fact is that it is difficult to envisage a process less compatible with Article 6 than the in-house review by one official of another official's decision on an issue on which the local authority, through both of them, sits as judge in its own cause. Starting from such a low base, delegation of the review function to a competent outsider on the kind of terms we have seen in this case, whatever its weaknesses, probably offers more in the way of independence and impartiality than the in-house system.⁴⁴

One can well-appreciate that the administrative-adjudicative relation is not necessarily a binary. There are some decisions which tend to the administrative and some to the adjudicative. One might, for example, say that factual disputes are part of the latter, most particularly as (at the moment) they cannot be re-opened through a public law avenue; and making a decision on the basis of administrative (or financial) priorities the former.⁴⁵

Equivalent rights

The common law duty of procedural fairness is ultimately malleable depending on the facts of a particular case.⁴⁶ The overall question concerning fairness may depend on whether the applicant's credibility is in doubt,⁴⁷ or, more simply, "the importance of what is at stake for him, as for society".⁴⁸ The flexibility inherent in the context of fairness suggests that there is no single standard; or, as Galligan tautologically puts it, "the standards of fair treatment in legal contexts are those authoritative legal standards which govern each form of process".⁴⁹ His point is that procedures are neither fair nor unfair in themselves but related to some other value, such as a better outcome or human dignity.⁵⁰ However, procedural protection is delivered at a cost to the administration, both in time and resources. Therefore, "... if efficiency is taken into account, the optimum level of

⁴⁴ *De-Winter Heald v Brent LBC* [2009] EWCA Civ 930; [2010] 1 WLR 990, [65].

⁴⁵ As Loveland has pointed out, the homelessness legislation is premised on the availability of local housing stock but, if there is none or limited amounts (eg of large bedroom stock), then one can more readily assume a decision against the applicant's interests: I. Loveland, *Housing Homeless Persons* (1995).

⁴⁶ See, for example, Lord Bridge's classic statement in *Lloyd v McMahon* [1987] AC 625, 702: "My Lords the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates".

⁴⁷ See, for example, *R v Hackney LBC ex p Decordova* (1994) 27 HLR 108, 113, Laws J: "In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer her accommodation in a particular area, they are bound to put to the applicant in an interview, or by some appropriate means, the matters that concern them".

⁴⁸ *R(Smith and West) v Parole Board* [2005] UKHL 1, [35], Lord Bingham.

⁴⁹ *Ibid*, 55.

⁵⁰ Similarly, Lord Reed in *Re an application of James Clyde Reilly for judicial review* [2013] UKSC 61, at [68] (referring to J. Waldron, "How law protects dignity" [2012] CLJ 200, 210): "justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken".

procedural protection will be that which minimises both the costs of the procedure (*direct costs*) and the costs of reaching an incorrect decision (*error costs*)”.⁵¹

There is no functional equivalent process in other areas of administrative decision-making to the regulation under consideration in this article. The closest was perhaps the social fund internal review hybrid process.⁵² What Regulation 8(2)’s purpose or purposes is/are or might be is somewhat obscure. It certainly came from nowhere. Although it offers procedural protection to an applicant, the fact that it remained unchallenged for nine years suggests that its significance was lost on most. In Galligan’s terms, it suggests that there are tertiary level values inherent in scrupulous due process where the original decision was made for the wrong reasons but the reviewer has decided to uphold it.

The judicialisation of the regulation: Producing the mirror image

In the Court of Appeal, five thorny issues have been canvassed, each of which, at heart, goes to the questions addressed in this paper:

- a. How significant is the procedure prescribed by the regulation?
- b. What is a “deficiency”?
- e. Is there a “sufficiency” requirement, ie is there a threshold below which a deficiency or irregularity does not require the operation of the procedure?
- c. If the “original decision” was properly made but subsequently “comes to have” a defect, should the regulation be adopted?
- f. What are the procedural requirements of the regulation?

How significant is the Regulation 8(2) procedure?

In short, the Court of Appeal has found that if the procedure is, or properly should be, engaged, then a failure to follow it will vitiate the review decision full stop. As Lawrence Collins LJ has put it, the procedural safeguards in the 1999 Regulations “... are of the highest importance, and any significant departure from the procedural rules prejudicial to the applicant would afford a ground of appeal”.⁵³ Indeed, it is not for the applicant to raise the regulation on the review – the reviewing officer must automatically consider it and give reasons as to why it is or is not engaged.⁵⁴ Thus, the regulation appears to operate outside the permissible boundaries usually accorded to homelessness review officers.⁵⁵

The starting point is that the regulation engages a “dual mandatory obligation”:

⁵¹ M. Adler, “Understanding and analysing administrative justice”, in M. Adler (ed.), *Administrative Justice in Context*, (2010), 133.

⁵² *Op cit* n 38, 302.

⁵³ *Banks v Kingston-upon-Thames LBC* [2009] HLR 29, [65] referring to *Begum v Tower Hamlets LBC* [2003] 2 AC 430, [9].

⁵⁴ *Lambeth LBC v Johnston* [2009] HLR 10, Rimer LJ, [51]

⁵⁵ Although that is not an entirely straightforward point because, if the administrator *does* consider the regulation but decides not to engage it, such a decision can only be challenged on narrow *Wednesbury* grounds.

First, to “consider” whether there was a deficiency or irregularity in the original decision or in the manner in which it was made. Secondly, if there was -- and if the review officer is nonetheless minded to make a decision adverse to the applicant on one or more issues -- to serve a “minded to find” notice on the applicant explaining his reasons for his provisional views. In my judgment, there is no discretion on the review officer to give himself a dispensation from complying with either of those obligations. As regards the first part of it, [it] is not a purely subjective exercise but that failure to arrive at the right “consideration” can be challenged on usual public law grounds. As regards the second part, the language of regulation 8(2) is unambiguously mandatory – “the reviewer shall notify ...”.⁵⁶

This holds good even if the review officer believes that further representations will be irrelevant. Here, the Court of Appeal has given elegiac paeans to the significance of such representations and, in particular, advocacy:

It is one thing for an applicant to be able to make representations on the matters in issue and then apprehensively await the review officer’s decision, whichever way it may go. It is quite another for an applicant, not just to be able to make such representations, but then also to be given (i) advance notice of the review officer’s reasons for his provisionally adverse views, and (ii) the opportunity not just to make further written representations as to why those views are not justified by his reasons, but also oral representations to that effect. Previously the applicant will simply have addressed the issues as best he can. Now he will have the opportunity to respond specifically to the review officer’s own reasons as to how he proposes to deal with the issues. That is a most important advantage to the applicant. It may well, in many cases, enable him to engage in no more than an exercise of advocacy. But advocacy can turn a case. There can be few judges who, having formed a provisionally adverse view on a skeleton argument advanced in support of a case, have not then found their view transformed by the subsequent oral argument for which, in the art of advocacy, there is no comparable substitute. The opportunity open to an applicant to try, by written and/or oral argument, to persuade the review officer that his reasoning for his provisional conclusion is mistaken is – at the very least – potentially of great benefit to an applicant. To be deprived of that right is or may be seriously prejudicial.⁵⁷

The practical significance of these comments, from the applicant’s point of view, is that the local authority cannot sensibly argue that the applicant on a county court appeal should not be given relief.⁵⁸ Relief in a homelessness appeal before the county court on a point of law is just as discretionary as it is in a “normal” judicial review. If it can be said that there is always the possibility of the local authority changing its mind after the applicant’s advocacy, it is not open to the authority or the court to argue that relief should be refused – the court cannot be sure what the outcome would have been as oral advocacy could have turned the review decision. However, it also tends towards the point of image-replication because the reasoning makes the review process and judicial processes effectively synonymous through comparison.

⁵⁶ *Id.*

⁵⁷ *Johnston*, [53]

⁵⁸ The court has power, as it thinks fit, to confirm, quash or vary the review decision: s. 204(3).

What is a deficiency?

The leading case is *Hall v Wandsworth London Borough Council*.⁵⁹ The facts, so far as they are material, concerned whether the applicants were in priority need as a result of significant medical factors. In *Hall*, the original decision had applied the wrong test for vulnerability; in the allied case of *Carter*, the original decision failed to give reasons as to why the officer was departing from the consultant's view that Ms Carter was "a very vulnerable person".

Carnwath LJ used the case as an opportunity to set down guidelines on the meaning of the word "deficiency" as used in the regulation. He said:

29. The word "deficiency" does not have any particular legal connotation. It simply means "something lacking". There is nothing in the words of the rule to limit it to failings which would give grounds for legal challenge. If that were the intention, one would have expected it to have been stated expressly. Furthermore, since the judgment is that of the reviewing officer, who is unlikely to be a lawyer, it would be surprising if the criterion were one depending solely on legal judgment. ...

30. To summarise, the reviewing officer should treat regulation 8(2) as applicable, not merely when he finds some significant legal or procedural error in the decision, but whenever (looking at the matter broadly and untechnically) he considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker. In such a case, if he intends to confirm the decision, he must give notice of the grounds on which he intends to do so, and provide an opportunity for written and (if requested) oral representations.

That summary has been held to be definitive and, by way of contrast to the previous section, the analysis expressly recognises that the review process is more akin to an administrative one staffed by non-lawyers.

That analysis was glossed in *Mitu v Camden London Borough Council*, in which the Court of Appeal drew a distinction between a "decision" and an "issue":

Section 184 (1) contemplates two decisions. The first is whether the applicant is eligible for assistance. The second is whether any duty, and if so what duty, is owed to him under the Act. The second decision is thus concerned with the duty owed by the local housing authority; not whether the applicant is intentionally homeless or has a priority need. These questions are, in the terminology of section 184 (3), "issues" which need to be determined on the way to the ultimate decision. Nor is the decision concerned with the local housing authority's powers (as opposed to duties).

... Regulation 8 (2) also speaks of a deficiency in a "decision" and distinguishes that from "issues" on which the reviewer is minded to find against the applicant. Thus a thread running through both the primary legislation and the regulations is a clear and consistent distinction between the decision on the one hand, and issues on the other.⁶⁰

This division of the legislation into decisions and issues is technically correct, but, it is submitted, unnecessary if one is following the "broad and untechnical approach" which Carnwath LJ advocated. As we shall see below, although that distinction has been the subject of judicial approval,⁶¹ it is not

⁵⁹ [2005] HLR 23.

⁶⁰ *Mitu*, [12]-[13].

⁶¹ *Ibrahim*, [15], Sedley LJ.

entirely free from doubt. This doubt is exacerbated when one considers the issues which have been regarded as deficiencies in decisions. So, it is said that a deficiency arises, for example, where the review decision is made on a different basis to the original decision; or it is unclear whether the original decision-maker applied the right test; or different officers have given different decisions on the application.⁶²

However, a deficiency does not arise simply because the reviewing officer took a different view from the applicant on the facts.⁶³ Thus, in *Maswaku*, the applicant claimed that there had been a deficiency because the decision maker had failed to take in to account new facts which, on her submissions, made the accommodation not suitable and which had not been considered by the original decision-maker. In summary, the reviewer had simply taken a different view of the facts from the applicant (although, oddly, Mummery LJ refers to the decision not being “legally erroneous” in that respect).⁶⁴ This establishes the equivalent of the general judicial approach to challenges on appeal to a judge’s findings of facts⁶⁵ – in this sense, then, the adjudicative frame becomes prominent at this point. It has also been held that, where the applicant is offered temporary accommodation by the authority, and the offer letter does not indicate why the authority regard that accommodation as “suitable”, there is no requirement for a Regulation 8(2) letter, otherwise “this would mean that every offer of temporary accommodation would require to be accompanied by a regulation 8(2) letter”.⁶⁶

If the “original decision” was properly made but subsequently “comes to have” a defect, should the regulation be adopted?

In *Banks v Kingston-upon-Thames LBC*, the section 184 decision was that Mr Banks was not homeless. After that decision was made, Mr Banks was served with a notice to quit. The issue on the review changed as a result, it now being accepted that Mr Banks was homeless; now, the question was whether he was in priority need. Lawrence Collins LJ, with whom Wilson and Longmore LJ agreed, recognised that, on a literal approach to Regulation 8(2), there was no deficiency or irregularity with the original decision.⁶⁷ He said:

But an important objective of Regulation 8(2) is to ensure that, where the reviewing officer is minded to confirm a decision on different grounds, the applicant should be given an opportunity to make representations. I was convinced by the argument for Mr Banks that a purposive construction should be given to Regulation 8(2) to ensure that its objective is achieved. ... But this is a system in which the applicant will be acting in person, and I consider that Regulation 8(2) should be interpreted so as to ensure that the individual is afforded the procedural safeguard even if the review route is taken.

Consequently I am satisfied that, although the original decision itself cannot be faulted, it came to have a deficiency which was of sufficient importance to justify the additional

⁶² Respectively: *Mitu*; *Hall*; and *Johnston*.

⁶³ *Maswaku v Westminster CC* [2012] EWCA Civ 669.

⁶⁴ [62].

⁶⁵ *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230, [72].

⁶⁶ *Obiorah v Lewisham LBC* [2013] EWCA Civ 325.

⁶⁷ [71]-[72].

procedural safeguard, in the sense that further representations made in response could have made a difference to the decision that the reviewing officer had to make.

This approach to the operation of the regulation demonstrates a formalisation of the review process beyond ordinary principles of public law. On the face of the regulation itself, such an approach is not warranted because, presumably, the parliamentary draftsman believed that, in such a case, the proper approach would be for the reviewing officer to uphold the review and refer the matter back for a fresh initial decision.⁶⁸

In any event, when does a section 184 decision come to have a deficiency after the event? This is a question on which, apparently, County Courts have differed. Say the applicant provides one story which underpins a finding of intentional homelessness in the section 184 decision, but subsequently provides another, different story in the review process. The reviewing officer sends the applicant a letter, which is not strictly a "minded to" letter, informing the applicant that the officer does not believe the applicant's second story and invites further representations. Clearly, there is no deficiency in the original decision but can it be said that the original decision became deficient when the reviewing officer disbelieves that second story?

In *NJ v Wandsworth London Borough Council*, NJ was provided with accommodation in a refuge in Lambeth following domestic violence. She was found not to have a local connection with Wandsworth. On review, the officer sent a minded to find notice. Subsequently, NJ was moved to a hostel in Southwark because of the fear that her ex-partner was trying to find out where she was living. This new fear was communicated to the reviewing officer by NJ's solicitors. The review decision dismissed the information concerning NJ's fears about her ex-partner. The Court of Appeal held that the reviewing officer should have served a second minded to notice under the regulation because NJ's fears were not considered in the original decision (they arose subsequently) - otherwise she "...was denied the opportunity of commenting on the [reviewing officer]'s reasons why the risk of future violence has been discounted".⁶⁹ Lewison LJ sought to set out some general principles in these type of cases:

- i) Where new facts emerge that relate to an important issue in the case the reviewing officer must consider whether those new facts expose a deficiency in the original decision.
- ii) They will expose a deficiency in the original decision if in the light of those new facts that issue was either not addressed or not adequately addressed.
- iii) Although it will usually be the case that there was a deficiency in the original decision if the reviewing office decides to uphold it on different grounds, there may yet be a deficiency if the reviewing officer decides to uphold the decision on the same grounds.
- iv) If the reviewing officer comes to the conclusion that there was a deficiency (in the extended *Banks* sense) in the original decision but nevertheless is minded to uphold it (whether on the same or on different grounds) he or she must serve a "minded to find" notice.
- v) If the reviewing officer concludes that there is no deficiency, that conclusion is susceptible to judicial review on the usual public law grounds.⁷⁰

⁶⁸ This was precisely what Longmore LJ believed should have happened: [74].

⁶⁹ [46], Gloster LJ.

⁷⁰ [71].

These general principles demonstrate just how judicialised and sensitive the regulation has become. Although the courts jealously and zealously uphold the principle that good administration should not be undermined by over-technical “nitpicking” challenges, that principle appears to be of lesser significance when it comes to the regulation.

Yet, there is an outstanding question as to the correctness of *Banks* in this context. It arose in *Temur v Hackney LBC*.⁷¹ Here, the original decision was that Ms Temur was homeless but not in priority need. After that decision and her request for a review of that decision, her daughter came to live with her. She was, thus, in priority need. The reviewing officer issued a “minded to” notice under the regulation informing her that he was now minded to find that she was not homeless. It was argued that, if one is to take the distinction between a “decision” and “issues” seriously, this minded to notice went beyond the reviewing officer’s power, something which could not be rectified by use of the regulation. This was because the decision as to duty owed is different if the applicant is or is not homeless and is or is not in priority need. Effectively, the reviewing officer was then making a decision as to duty of a decision that he had made, contrary to the regulations.⁷² What the reviewing officer should have done was to require a further original decision; the minded to notice could not cure the lack of such a decision and Ms Temur had effectively been prejudiced by it. Accordingly, it was argued that *Banks* was wrongly decided and *per incuriam*. Jackson LJ ducked that question, holding that circumstances simply change between decision and review dates so that it would otherwise be absurd to rely only on facts as at the date of the original decision.⁷³

Lewison LJ also found for the local authority. Not only was he bound by authority and the words of the statute (which describe the duty in the present tense and appear, on one reading, to give the reviewer wide ambit), he said that “... regulation 8 (2) is procedural only. It cannot dictate the scope of the review mandated by the statute. Fourth, policy considerations dictate the same result. Social housing is a valuable resource. If, after the original decision, but before the review, the applicant ceases to be homeless it would be extraordinary if the authority still had a duty which, in terms, is confined to those who are homeless or threatened with homelessness”.⁷⁴

In a sense, one can say that this contested question may be a non-question. Where there is a change of circumstances, the applicant is entitled to make a re-application. The low threshold requirement for such a re-application is simply that the application is not based on exactly the same facts.⁷⁵ Thus, in all these cases, the better answer to the question – and one in which the applicant is better protected than requiring this procedural step – is that the applicant simply re-applies.⁷⁶ The argument in *Temur* effectively accepted that but put the onus on the reviewing officer to make that decision, as opposed to an applicant (who may well not be represented). In effect, then, the court has contorted the regulation to provide an unnecessary procedural protection where none was actually required.

⁷¹ [2014] EWCA Civ 877 –it is understood that Ms Temur is seeking funding to appeal to the Supreme Court.

⁷² Reg. 2 – see above.

⁷³ [35].

⁷⁴ [85].

⁷⁵ *Rikha Begum v Tower Hamlets LBC* [2005] EWCA Civ 340; [2005] HLR 34.

⁷⁶ That “solution” is suggested both in *Banks*, [74], and *Temur*, [70]. The applicant is better protected because there will be a further initial decision and the local authority has an accommodation obligation pending its decision: s. 184.

Is there a “sufficiency” requirement, ie is there a threshold below which a deficiency or irregularity does not require the operation of the procedure?

In *Hall*, Carnwath LJ, in dealing with the meaning of the word “deficiency”, implied that there was a threshold below which a deficiency of irregularity does not “count” for the purposes of the regulation. He said that the “something lacking” “... must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard”. Such a decision is for the local authority itself and challengeable only on Wednesbury grounds.⁷⁷ This substantiality requirement appears sufficient to enable deference to be accorded to the review decision and procedure adopted by the decision-maker.

As Rix LJ pointed out in *Mitu*,⁷⁸ it is difficult to see where *Johnston* fits into the jurisprudence. In *Johnston*, the issues were well-known to both the applicant and the authority. There had been two review decisions, one of which had been quashed, the applicant had made representations, and the issues were well-crystallized. Rix LJ appears to confine *Johnston* to its particular facts. He said

In circumstances where it is plain that the flaw in the original decision was unarguably material, but what was in effect being submitted was that the subsequent representations had necessarily exhausted what could usefully be said on the applicant's behalf, the decision is wholly understandable. However I do not regard *Lambeth* as undermining the teaching of *Hall* and *Banks* that, giving to regulation 8(2) a purposive construction, it is not simply any flaw in an original decision which triggers the need for a notice and reasons, but what might be described as a material or relevant flaw in the sense of being of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard.

This sufficiency requirement was considered again by the Court of Appeal in *Ibrahim v Wandsworth LBC*,⁷⁹ where the Court divided in its reasoning. That division reflected a basic disagreement as to the deference to be accorded to decision-makers. The original decision was that the applicant was eligible, homeless, in priority need, but intentionally homeless. It said that the council's duty was to provide advice and assistance only. That subsequent description of the duty was “seriously erroneous” because the council also had a duty to secure that accommodation was available to her for such period as they considered would give her a reasonable opportunity of securing accommodation for herself.⁸⁰ Representations were made on the review by Ms Ibrahim's advisors, which did not address that deficiency; and Wandsworth decided to provide accommodation pending the review. As Sedley LJ put it, as a result, “In real life, in other words, no detriment has at any stage flowed from the error in the decision letter”. Further, the review decision, which upheld the original finding of intentional homelessness stated the duty correctly.

Nevertheless, Ms Ibrahim argued that Regulation 8(2) was engaged. Her appeal was ultimately dismissed but Sedley LJ and Etherton LJ's reasoning was rather different. Perhaps unhelpfully, Mummery LJ agreed with both judgments, although he picked and chose with which elements he agreed. Etherton LJ's judgment provides what might be termed the traditional analysis. He held that the decision as to duty was not a “relevant decision” because:

(1) it was not the subject of any complaint by the applicant about the decision letter on the review; (2) it was not a decision which the reviewer upheld; and (3) the reviewer did not make any decision on the same matter against the interest of the applicant, but, on the

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⁷⁸ [38]-[40].

⁷⁹ [2013] EWCA Civ 20; [2013] HLR 15

⁸⁰ S. 190(2).

contrary, stated the council's duty correctly. Accordingly, reg.8(2) was not engaged, and that is the end of this appeal.⁸¹

Further, even if the reviewing officer had considered that the original decision was deficient in some way, she would have been bound to conclude that there was no requirement to serve a "minded to" notice, and there would have been no scope for challenging the review letter under section 204.

Sedley LJ began his judgment with the following question: "How should the courts deal with a plainly deficient homelessness decision when the deficiency has had no adverse consequences for the applicant?"⁸² He noted that the words "deficiency" and "irregularity" are unqualified by any adjective on the terms of the regulation itself. Thus, if the matter was considered afresh untrammelled by authority, he would have held that, other than trivial and marginal criticisms, where the reviewer finds that a deficiency or irregularity was not such as to affect the original decision, the reviewer can only do so after giving a "minded to" notice. Obiter, he said that, had the reviewing officer given thought to whether Regulation 8(2) was engaged, the error was a deficiency "... since it went to the heart of the council's obligations and the applicant's entitlements".⁸³ He found against Ms Ibrahim essentially on whether she was entitled to relief, viz because the deficiency was, in the circumstances of the appeal, irrelevant. He went on, "This answer, while reflecting little credit on the process, has at least the advantage of acknowledging that the error in the original decision was, by any lexicographical test, a deficiency, but that it had in the event no adverse consequence for the applicant".⁸⁴

Perhaps the difference in reasoning offers a distinction without a difference – either way, Ms Ibrahim's appeal failed, but it cannot be said that the same will be true in other appeals.

What are the procedural requirements of the regulation?

Once a reviewing officer has decided that Regulation 8(2) is engaged, the question then arises as to how that officer should comply with the obligations. How court-like should the procedures be? To what extent is the judicial mirror precise or curved?

The content of the obligations was particularly considered by the Court of Appeal in *Gibbons* and *Makisi*.⁸⁵ The preliminary point to note, though, is that the reviewer must provide the reasons why they are "minded to" uphold the original decision. It makes sense for the reviewer to provide their full reasons in such a letter because, if they do not, and subsequently rely on other reasons of which the applicant was unaware, the applicant will be likely to be successful on an appeal (for obvious reasons).

The principal question addressed by the courts is as to how the applicant "may make representations to the reviewer orally or in writing or both orally and in writing". In *Gibbons*, following the service of a minded to letter by the authority, the applicant's advisor requested an oral, face-to-face meeting between themselves, Mr Gibbons, and the authority. The authority did not respond to that request (although they did grant an extension of time for making representations as requested). Jackson LJ said: "It was clear that without legal assistance Mr Gibbons did not have the ability to make any relevant submissions or comments concerning the

⁸¹ [36].

⁸² [1].

⁸³ [23].

⁸⁴ [31].

⁸⁵ Respectively [2010] EWCA Civ 327; [2010] HLR 33 and [2011] EWCA Civ 355; [2011] HLR 27

"minded to" letter dated 31st March 2009. Mr Gibbons made this plain when he attended the housing department on 8th April 2009".⁸⁶ On the facts, an oral hearing was clearly required (although the content of that hearing was not determined).

Makisi was a case in which three appeals against Birmingham's operation of the regulation's procedure was in issue. Birmingham had developed a practice where it conducted its reviews by telephone, with the assistance of an interpreter as necessary, unless there was some practical reason why representations could not be made by telephone. In each case, the appellants requested a face-to-face meeting. The request was refused in each case. The Court of Appeal held:

- a. The applicant has a right to demand an oral hearing at which the applicant with or without their advisor can make representations;
- b. The applicant is not authorised to call any third party witness or cross-examine others. The regulation only authorises a face-to-face meeting between the applicant, with or without a person acting on the applicant's behalf, and the review officer, at which oral representations can be made to the review officer.
- c. The review officer is, subject to that, able to determine where and when the hearing takes place and the procedure to be followed, including finding out in advance who will attend. What is contemplated by the regulation is a simple and relatively brief opportunity for the applicant to make oral representations to the review officer.

Three outstanding questions

There are three particular outstanding questions, which might be said to be peculiar to those administrative organisations which are high volume decision-makers.

The first question is about the relationship between the way in which decision letters are to be read in public law proceedings and the regulation. At heart, this is a question about whether the regulation might be framed as being purely procedural or substantive or whether such a binary is rather too simplistic; and it addresses the deference question head-on. It is a well-known principle of administrative law that decision letters, in particular those written by non-lawyers, are to be given a generous interpretation. In homelessness law, the words of Lord Neuberger in *Holmes-Moorhouse v Richmond upon Thames LBC*⁸⁷ have a particular resonance: "...a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions".⁸⁸

The question raised is whether the same approach should be applied to cases where the regulation is in issue. Oddly, there is no definitive answer to this question, which reflects the lack of definition about the review process itself. In *Nagi v Birmingham City Council*, the Court of Appeal drew on this principle in part to suggest that the original decision did not have a deficiency or irregularity. The original decision was "poorly worded" and had "the hallmarks of a standard form letter" but it left

⁸⁶ [46]-[47].

⁸⁷ [2009] UKHL 7, [2009] 1 WLR 413.

⁸⁸ [50].

the reader in no doubt as to the conclusions and reasoning.⁸⁹ In *Ibrahim*, Sedley LJ drew on *Holmes-Moorhouse* as part of his reasoning in relation to relief. However, in *Mitu*, Lewison LJ addressed the written (but not oral) submission that *Holmes-Moorhouse* applied. He held that it did not:

In the present case the question is not (or not simply) whether [the] original decision can stand or even whether [the reviewer's] ultimate conclusion can stand. It is whether, on the way to reaching his ultimate conclusion, [the reviewer] ought to have given a "minded to find" notice under regulation 8 (2). *This is a procedural rather than a substantive question*. It is not an issue that Lord Neuberger addressed (because it did not arise in *Holmes-Moorhouse v Richmond-Upon-Thames LBC*).⁹⁰

The contrast between *Nagi* and *Mitu* is striking. It is submitted that the better approach is that adopted in *Mitu* because of the mandatory obligation on the reviewing officer. If the reviewing officer fails to consider whether the regulation applies, then the review decision itself should be struck down. In that sense, however, the simple binary between procedure and substance raised by Lewison LJ is flawed because procedures are fundamental to substance; indeed, procedures are substantive methods and principles affecting outcomes.⁹¹

These same kinds of fairly fundamental issues underlie the second question. What if a local authority, in seeking to protect itself against challenge and, perhaps, also seeking to do the right thing by giving an applicant a final say in the decision, automatically writes a "minded to find" notice under the regulation before each negative decision. In that notice, they do not identify a deficiency or irregularity in the original decision, but they do provide the full reasoning for their prospective negative decision. The issue here may well be fact-dependent. From the applicant's perspective, the purpose of the notice may be to identify the deficiency or irregularity so that they can attack it or offer an alternative view on it. From the local authority's perspective, the minded to find notice might be as a matter of good administration – so that the outcome falls within the boundaries of "accuracy" in so far as that is necessary in a heavily discretionary scheme.

A third question which arises is where the local authority issue a minded to find notice but mistakenly fail to offer an oral meeting. This seems to be a problematic practice. If we take seriously the paeans to oral advocacy and the mandatory *right* to make oral representations enshrined in the regulation, then such a notice is inherently flawed. However, if the recipient of that notice is, and is known to be, a lawyer, then the question has arisen as to whether the flaw remains. If the process is "unambiguously mandatory", then it matters not a jot that the recipient is a lawyer. Further, the realities of legal advice in homelessness cases are that solicitors are not always aware of the technicalities – that is no slur on solicitors, but a reflection of the reality that Part 7 and the review regulations have been made technical through judicial precedent, as well as the fact that, inevitably, legal aid solicitors are under considerable external pressures. As has been seen in this article, the regulation itself has led to contestations in the case law which cannot easily be smoothed over. However, the Court of Appeal recently refused to grant permission to bring a second appeal in such a case, but on the basis that it did not raise an important point of principle or practice.⁹² The point remains live in the county court.

⁸⁹ [2011] EWCA Civ 355; [2011] HLR 27 [76]-[77].

⁹⁰ [22], my emphasis.

⁹¹ See Galligan, 91-5; cf Adler, 140.

⁹² *Waise v Bristol CC* B5/2014/1343.

Conclusions

The homelessness decision-making process has become significantly contested and adversarial. The Court of Appeal seems to have alternated between, on the one hand, creating a review process in its own image – hence the significance, for example, of advocacy – and recognising that the review process is largely an administrative process, designed as a check on the original decision, to which deference should be given – hence the substantiality requirement. Empirical assumptions underpinning both approaches may well be questioned, as a result of what we know about the limited use of the review process itself. What seems to have happened is that the primary audience for decisions is not the affected applicant but their legal and other adviser and, more particularly, the court. Decisions are sought to be “judge-proof”; anecdotally, it is said that many now contain paragraph numbers like court judgments.

Legislation designed to assist the poor is commonly overly complex and subject to apparently neutral judicial interpretation.⁹³ Judicial interpretation of homelessness law is complex and contorted as (on a benign view) different scenarios contribute to a thickening of legal principle, resulting in complex jurisprudence. The jurisprudence of Regulation 8(2) offers a case study of how an apparently procedurally valuable right offered to a vulnerable population (ie homeless applicants) has resulted in a jurisprudence that is, at best, complex and, at worst, contradictory both in terms of the regulation itself (for example, the sufficiency requirement) and successive case law overlays (the issue/decision distinction). The judicialisation of the regulation – which was originally designed as a device to give limited procedural protection to applicants – has led to some counter-intuitive outcomes as a result of purposive readings and simply reading in a substantiality requirement. The review procedure itself has become judicialised and, even though we recognise that review officers are not legally trained, we have tried to ensure that they operate in the judicial image. They are, after all, effectively judging an application from an administrative perspective, with limited rights of appeal against their decision.

We should not lose sight of the fact that the purpose of the review procedure and the regulation itself are to protect applicants, only some of whom will be represented. Indeed, whether the judicial approach assists principles of good administration must be open to doubt, in part because of the lack of clarity, which in turn leads to the “judge over your shoulder” kind of defensive practices. Judicial creativity in this area, however, quickly unravels. This jurisprudence, such that it is, does no credit to anybody, let alone serving the interests of the reviewing officers and applicants.

⁹³ E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975), 202-12; Z. Bankowski and G. Mungham, *Images of Law* (1981); P. Robson and P. Watchman, “Sabotaging the Rent Acts”, in P. Robson and P. Watchman (eds), *Justice and Lord Denning* (1981); I. Loveland, *Housing Homeless Persons* (1995), ch 3.